

1976

Ernest H. Dean, W. Hughes Brockbank v. Calvin L. Rampton. Clyde L. Miller, Vernon B. ROmney, and David S. Monson : Petition for Rehearing

Utah Supreme Court

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BRIEF

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ERNEST H. DEAN, as President of the Utah
State Senate and as Chairman of the Legislative
Management Committee of the Forty-First
Legislature of the State of Utah; RONALD L.
RENCHE, as Speaker of the Utah State House of
Representatives and as Vice-Chairman of the
Management Committee of the Forty-First Leg-
islature of the State of Utah; and W. HUGHES
BROCKBANK, as a member of the Senate of the
Forty-First Legislature of the State of Utah,

Plaintiffs and Respondents,

vs.

CALVIN L. RAMPTON, Governor of the State of
Utah, and as a member of the Board of Examiners
of the State of Utah; CLYDE L. MILLER, Lieutenant
Governor and Secretary of State of the State of
Utah and as a member of the Board of Examiners
of the State of Utah; VERNON B. ROMNEY, Attorney
General of the State of Utah and as a member of
the Board of Examiners of the State of Utah; and
DAVID S. MONSON as Auditor of the State of Utah,

Defendants and Appellants.

PLAINTIFFS' PETITION FOR REHEARING
AND BRIEF IN SUPPORT THEREOF

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE
STATE OF UTAH

ERNEST H. DEAN, et al.,

Respondents,

Case No. 14518

vs.

CALVIN L. RAMPTON, et al.,

Appellants.

PETITION FOR REHEARING

COME NOW the plaintiffs and respectfully petition this
Honorable Court for a rehearing in the above-entitled case.

This Petition is based on the following grounds.

POINT I

THIS COURT ERRED IN DETERMINING THAT THE
BOARD OF EXAMINERS HAS A CONSTITUTIONAL
RIGHT OF PRIOR APPROVAL ON PROPOSED
EXPENDITURES.

In its decision of October 21, 1976, this Court found against
plaintiffs and in favor of defendants apparently on the basis that
Subsection (3) of Section 63-2-15, U.C.A. 1953, purports to exempt
members of the legislature from submitting the claims in question
to the Board of Examiners and, therefore, that it is in conflict
with Section 13, Article VII of the Constitution of Utah and thus
is invalid to that extent. This determination, in effect, broadens
the power of the Board of Examiners beyond any powers granted by the

Constitution. If this decision stands uncorrected, the Board of Examiners will henceforth have the power of prior approval of any proposed budgetary expenditures in addition to its right to approve claims, both liquidated and unliquidated. Such prior approval powers were nowhere given in the Constitution to the Board of Examiners. In fact, the only existing power of prior approval in the Board of Examiners was granted by the Legislature itself in Section 63-2-15(3), U.C.A. 1953, passed in 1941. Absent that statute, the Board has only the ". . . power to examine all claims against the State except salaries or compensation of officers fixed by law. . .", Section 13, Article VII. This new power was granted, rather, under the additional provision of that Section which provides, "and perform such other duties as may be prescribed by law."

Admittedly this Court has laid to rest any issue of its determination that the Board of Examiners can pass upon unliquidated claims (those claims made in the absence of any legislative appropriation or which are provided for by law but carry no means for settlement) and liquidated claims (private claims against appropriated funds and agency claims against state appropriations).

In the case at bar, however, the Court is confronted with neither a "liquidated" nor an "unliquidated" claim but, rather, a proposed budgetary expenditure. As the Court noted in its decision of October 21, 1976, after the travel had been completed, the actual and necessary expenditure receipts were properly submitted to the Board and were refused solely due to the fact that, prior to incurring the expenditures and, therefore, prior to having obtained a claim against the State, plaintiffs failed to submit these proposed budgetary

expenditures to the Board of Examiners for its prior approval.

No claim whatsoever by defendants is made that the travel was not necessary and appropriate or that the expenses were not actual and necessary. Both of these items were stipulated by the parties at the District Court level. The only basis for not allowing these claims, therefore, was the failure of the plaintiffs to comply with the general provisions of Section 63-2-15(3), which by its own terms specifically excluded plaintiffs from such requirement. The Court, in finding that the Board of Examiners properly refused payment, have created a new area of power in the Board which was never intended by the founding fathers.

To better understand the import of such a determination by this Court, the historical development of the Board should be examined.

The Constitutional provision originally creating a Board of Examiners with power to examine all claims was, and still remains, somewhat ambiguous since it does not define the terms "examine" or "claim". However, the 1896 Legislature attempted to outline the powers and duties of the Board and establish such procedure. With the passage of Chapter 35, Laws of Utah 1896, the Legislature established the Board's duties as including the following, insofar as applicable to this matter:

"7. The Board shall receive claims for which an appropriation exists and when approved, transmit same to auditor for payment.

8. The Board shall receive claims for which no appropriation is made, the settlement of which is provided by law, and transmit same to the Legislature with a statement of approval.

9. Any claim, the settlement of which is not provided for by law, must be received by the Board; and on the first Monday in November preceding the meeting of the Legislature, the Board must hold a

session for the purpose of examining such claims. An abstract of these claims must then be submitted to the Legislature."

The first meeting of the Board of Examiners took place on March 7, 1896, three days after the approval of the above legislation. During the first two years most of the claims consisted of claims for goods and services rendered to the Territorial Government for which there was no appropriation, but which were required to be paid by law. Thousands of these types of claims were presented to the new government and required the determination of the Board whether the Territorial Government would have been obligated. An examination of these determinations shows the Board submitting claims to the Legislature for payment when no appropriation existed and denying payment of claims which they deemed not to be "proper expenditures". See Minutes of the Meetings of the State Board of Examiners, pp. 5-8. Claims for returning prisoners, claims for bounties, claims for printing notices required by law, and similar claims were first examined as part of the necessity of clearing up the obligations of the Territorial Government. This type of claim continued after statehood and became typical of one type of claim the Board of Examiners had to determine, that is, claims for any activities or programs the cost of which is not readily ascertainable in advance.

The second type of claims authorized by the 1896 Act, *supra*, were the tort or contract actions wherein the claimant had been injured by acts of the State. Originally, due to sovereign immunity, any redress had to be on moral, rather than legal, grounds.

Utah's constitutional and statutory law specifically provides for relief from grievances or wrongs committed by the state which,

except for sovereign immunity, would result in redress. On these items, the Board must first examine the claim and then forward it to the Legislature for their action, whether approved of by the Board or not. The Legislature must then determine whether or not to appropriate the monies therefore. In this area, it appears that the Board rejected claims they considered as "damage" claims and not legal liabilities against the State. Even though not considered by the Board, the Legislature often assumed liability solely as a moral obligation. See Minutes of the Meetings, Vol. I, page 155, and Laws of Utah 1896, Chapter 87.

The final category of claims is those claims established for which the appropriation has been made. The best example of this type of claim is simply an agency demand against appropriated funds. Laws of Utah 1896, Chapter 35, Sections 7, 8 and 9 show that this type of claim requires that the obligation already exist since it talks in terms of the Board endorsing their signatures on the claim and the auditor drawing his warrant for the amount approved. The examination of this type of claim, at least until 1941, constituted nothing more than an audit prior to payment--an approach justified by the fact that the auditor was performing the pre-audit and disbursing function.

It has been argued that the Board has both ministerial and discretionary authority and that discretionary powers must include an examination of proposed expenditures since, otherwise, it would merely duplicate the auditor's duties and functions. However, prior to 1941 the State auditor was not a post-auditor but, rather, the chief accounting officer and disbursing officer of State funds so the audit function was not a duplication but an important viable auditing role not encompassed

by any other state agency. After all, the Board was originally authorized by Laws of Utah 1896, Chapter 35, Sections 20, 21 and 22 and Chapter 102, to:

1. Audit the books of the State Auditor.
2. Hire outside auditors when necessary to audit books of all state officers and institutions.
3. Count the money in the State Treasury each quarter without giving prior notice.

Another factor in the history of the Board which should be considered in determining its power is that, from 1896 to 1921, in addition to examining claims, it also functioned as a State Board of Supplies and Furnishing. Until 1921, the Board of Examiners was given the statutory responsibility, as a Board of Supplies and Furnishing, to:

1. Contract for furnishing of all stationery, printing, binding, paper, fuel, lights and other necessary supplies used by the Legislature and the various departments. To receive all bids for same.
2. Hire all offices for the state; to furnish and keep same in repair.
3. Examine, when necessary, the inventory of all supplies and all accounts and vouchers for such supplies.
4. Hire clerical help for the various offices.

Thus, prior to 1921, the Board of Examiners did exercise certain limited control over proposed expenditures but it did so as a Board of Supplies and Furnishing, not as a Board of Examiners.

These additional powers were properly granted to the Board of Examiners by statute pursuant to Article VII, Section 13, wherein it states that the Board shall "perform such other duties as may be prescribed by law."

It is interesting to note that the Minutes of the Meetings of the State Board of Examiners does not list requests for clerical help or requisitions for supplies as being claims. They were, however, listed as claims when an account had been submitted for payment of goods received or services rendered. At this point, the claim was numbered and audited and an abstract of the claim made upon the Minutes of the Meetings of the State Board of Examiners. (See Volumes I and II.) Until 1903 each claim was numbered and individually entered upon the Minutes. While the Minutes noted certain requests to hire clerical help and purchase certain supplies, they were not listed as claims but as requests to the Board of Supplies and Furnishing.

It should be noted further that not all purchases were made by the Board of Supplies and Furnishing--only common supplies and the hiring of clerical help. In the case of outside purchases, the Board of Examiners had no knowledge of the proposed expenditure until a claim was submitted to the Board in the form of an account. Occasionally, one will note upon reading the Minutes of the Meetings of the State Board of Examiners that the Board rejected certain claims because the agency incurring the obligation had not yet verified the expenditure. From 1896 to 1921 major control over proposed expenditures rested with the individual agencies.

Then, in 1921, the governor placed a comprehensive state reorganization plan before the Legislature seeking to strengthen administrative management by placing responsibility for all fiscal affairs in the hands of the governor. A Department of Finance and Purchase resulted which was headed by a director appointed by, and responsible to, the governor. All of the powers and duties of the

Board of Supplies and Furnishing were transferred to this new department which was to be a central purchasing office and budget management department which had powers to:

1. Establish a uniform system of accounting.
2. Standardize all salaries for clerical and stenographic help.
3. Establish minimum work hours and related personnel policies.
4. Examine all requisitions and proposed expenditures of all state agencies.
5. Contract for all purchases and sell same.
6. To hire all offices and furnish and keep same in repair.
7. To investigate work arrangements and duplication of effort.
8. To prepare the budget for the governor for submission to the Legislature.

See Laws of Utah 1921, Chapter 127. From that time until 1925, this department had exclusive control over all proposed expenditures and, for the first time, departments were forced to seek prior approval on all purchases, supplies and personal services, and no payment would be made by the auditor on any expenditure which did not receive such prior approval. The Board of Examiners during this period continued to examine claims against the State, but only obligations which had been already incurred. The Minutes of the Meetings of the State Board of Examiners during this period suggests that the examination was somewhat superficial; e.g., "Claims 01484 to 01863 inclusive, received from the Department of Finance and Purchase, were approved by the Board and forwarded to the State Auditor for payment." Such did not, however, inhibit the Board of Examiners from pulling out questionable claims

(illegal or improper expenditures) and disallowing the same even though the goods and services had been received. (See Minutes, Vol. II.)

The Legislature apparently became disillusioned with the department and, in 1925, refused to appropriate funds for the continued operation of the department and its operations ceased soon thereafter. In 1927, the Legislature repealed the statutes creating the department and created a State Board of Supplies and Purchase, over the veto of the governor. The formal title in this new act specifically provided:

"An act relating to the civil administration of State Government, enlarging the powers of the State Board of Examiners; making that board a board of supplies and purchase. . ."

Through this act the powers and authority of the old department of finance and purchase, including budget preparation and the authority to examine all proposed expenditures, a power not theretofor held by the old Board of Supplies and Furnishing nor the old Board of Examiners. Otherwise, there would have been no reason to provide these powers statutorily. With the enactment of the 1927 act, the Board was now responsible for the budget, personnel, all purchases, accounting systems, and the examination of all proposed expenditures. The Board was authorized to hire an executive secretary to examine all proposed expenditures for the Board. The major difference between these provisions and the old Department of Finance and Purchase was that the Board of Supplies and Purchase acted for the Board of Examiners, not for the governor.

This arrangement was in effect until 1941, the Board of Examiners assuming in large measure the role of chief executive, exercising control over the preparation of the budget, all proposed expenditures, personnel policies, purchasing, and the like.

The present Department of Finance was created in 1941. Pursuant to that act, the governor was made responsible for the preparation and execution of the budget including the examination of all proposed expenditures. See Laws of Utah 1941 (First Special Session), Chapter 10. By that act (Sections 63-2-12 through 63-2-18, Utah Code Annotated 1953) the Department of Finance was to have powers including:

1. To prescribe and fix salaries for state officers and employees where not fixed by law.
2. Approve all requests for personnel.
3. Authorize travel expenses and establish regulations governing same.
4. Purchase all supplies, equipment and services for state agencies.
5. Prepare the biennial budget for the governor.
6. Miscellaneous other powers.

Additional strength was added to that department at the Second Special Session in 1941. See Laws of Utah 1941 (Second Special Session), Chapter 27. Among other changes, that act designated the state auditor as a post auditor, authorized the Department of Finance to maintain all State accounts, disburse funds, pre-audit claims, and establish a uniform system of accounting for State agencies. Further, it directed the Department to establish and maintain a budget control system, require work programs and approve or disapprove of all proposed state expenditures. These powers, then, do not differ greatly from those held by the Board of Supplies and Purchase. In the case of the Department of Finance, however, the governor was made responsible for the preparation and execution of the budget, including the examination of all proposed expenditures. There is no mention of the Board of Examiners in the law.

In view of this history, there can be little question of the intent of the 1941 Act. However, in actuality the management of the Department of Finance has become very much a part of the activities of the Board of Examiners. The Department has in practice been made an arm or agent of the Board of Examiners, thus preventing the separation of claims examination from the examination of proposed expenditures. There is no question that such a separation did exist in practice between 1921 and 1927 although in 1927 the Board of Examiners was given the additional authority to examine all proposed expenditures.

In 1941, the attorney general issued an opinion stating that the examination of proposed expenditures by the Department of Finance in no way prohibited the Board of Examiners from examining actual claims presented for those expenditures. See Biennial Report of the Attorney General, period ending June 30, 1942, page 83. However, on June 30, 1941, the attorney general issued a second opinion wherein he concluded that a "claim" included every type of commitment made by the State and payable out of public monies. Biennial Report, pp. 139-140. The Board of Examiners followed this with a communication to the Finance Commission stating, in part:

"As stated in the Attorney General's opinion of August 20, the procedure defined as aforesaid, seems adequate to accomplish the objective of our Constitutional provision in question. Naturally, the Board of Examiners by its order this day made, adopting and approving the said procedure, has constituted the Commission of Finance its agent, but the Board of Examiners is still held responsible for the results obtained. In other words, by the adoption of the outlined procedure, the Board of Examiners, may not evade or pass to the Commission of Finance its Constitutional responsibility. The

Board of Examiners, must, therefore, reserve supervisory control to the end that if, at any time, the procedure should prove inadequate to properly guard the public expenditures, the Board may have an opportunity to correct an irregularity found to exist. This, of course, means that any time the Board sees fit to question any commitment at any state of the procedure, it may do so." See Minutes of the Meetings, Vol. VIII, p. 1085.

Thus, despite the Legislative attempt to remove powers theretofor given by it to the Board of Examiners, the Board took it upon itself to determine that it would not release those powers.

Finally, in 1963, an attempt was made once again by the Legislature to emphasize that the Board would not have the power to examine proposed budgetary expenditures until they had cleared the budgetary machinery and were, in fact, obligations on the part of the State. This Act was challenged, however, in Toronto vs. Clyde, 15 Utah 2d 403, 393 P 2d 795 (1964).

In the course of that decision, the Court indicated its feeling that the framers of the Constitution had intended to vest in the constitutional officers, ". . . more than a mere auditing function, that is, power to examine into the adviseability and necessity of any disbursement or proposed obligation of the state; and that this has the effect of giving examiners general supervisory power over expenditures by the state government" and, further, that:

"It is obvious that if the examiners could not examine and pass upon expenditures before obligations were incurred, their function as to fiscal control would be greatly impaired, if not entirely destroyed."

Similar statements had been made by the Court prior to the Toronto decision in Wood vs. Budge, 13 Utah 2d 359, 374 P 2d 516 (1962)

and Bateman vs. Board of Examiners, 7 Utah 2d 221, 322 P 2d 381 (1958).

In setting forth the foregoing history of the Board's powers, the plaintiffs are by no means unmindful of those decisions and the language set forth therein.

Plaintiffs respectfully contend, however, that the earlier decisions of this Court stand in direct contradiction to such expansive powers and have never been expressly overruled. In fact, the earlier cases would appear to be closer in time to the original drafting of the constitutional article and more familiar with the intent surrounding it.

In 1899 in Thoreson vs. State Board of Examiners, 19 Utah 18, 60 Pac. 982 (1899), the Legislature made an appropriation for the payment of monies improperly received by the State and directed the Board to receive audit and allow just claims for such reimbursement. There, as in the case at bar, the appellant admitted the facts showing that the claim was a just one; but upon rehearing (21 Utah 187), the Board claimed that a claim for payment was not first presented to the Board pursuant to Article VII, Section 13 of the Utah Constitution. The Court responded to that claim by explaining that the respondent:

"Never had any claim against the territory, and did not have any against the state until the passage of Section 963, Rev. Stat., nor was the state under any, except a moral, obligation to pass an act for the relief of such persons."

Therefore, that section of the Utah Constitution had no relevancy.

Further, in Bateman, supra, the Court indicated that "claim" was used in its broadest connotation susceptible of various meanings and then set forth examples as:

" . . . ranging from a moral claim; or the seeking of legislative largesse; or asserting a privilege; to asserting rights to compensation for property or materials furnished, or salary for services rendered, to the state."

It should be noted that nowhere in those examples of various meanings of "claim" is the concept of approval on proposed expenditures set forth. All of the items referred to are actual "claims" where a present right or privilege for recompense exists.

Plaintiffs respectfully contend that the history of the Board and this Court's earlier decisions properly indicate that the powers of the Board must be deemed limited to the examination of actual "claims" against the State rather than all proposed budgetary expenditures, notwithstanding the language in Toronto.

POINT II

A DETERMINATION OF THIS COURT THAT THE BOARD OF EXAMINERS HAS A CONSTITUTIONAL RIGHT OF PRIOR APPROVAL ON PROPOSED EXPENDITURES WOULD DESTROY THE LEGISLATIVE BRANCH OF GOVERNMENT.

As noted in Point I, the history of the Board and the language of this Court in its earlier decisions and, particularly, in the Thoreson case , supra, indicates that the Board of Examiners' constitutional power was limited to actual existing claims against the State and any power of approval of proposed budgetary expenditures existed in the Board only as temporarily granted by the Legislature, It will be noted that such grants of

power, like in Section 63-2-15, have generally excluded control over the Legislature. This has not been simply due to jealousy of the legislative power. It is simply that such power cannot be logically applied to the Legislative Branch. This Court's apparent determination that the Board of Examiners now has the constitutional power of prior approval of proposed budgetary expenditures, even over the Legislature, demonstrates the crucial problems which result from such an extension.

Throughout the Constitution and throughout the history of this State, there has never been any question but that the Legislature has the ultimate control on the "purse strings" of the State and has the power to determine what expenditures should be made by way of appropriations of proposed expenditures of the various departments and agencies of the State. The decisions of this Court have heretofore engrafted the exception upon that concept that the Board of Examiners shall have the power to approve the actual expenditures of those appropriations by those agencies. However, if the present decision of this Court remains uncorrected, the Legislature is placed into a position where it must obtain the approval of the Board of Examiners of its budgetary appropriations for the State prior to passing the same. Clearly such a situation was never intended by the founding fathers. Otherwise, why have the governor responsible for the preparation of a proposed budget and submission of the same to the Legislature?

Taken one step further, why have a Legislature at all, for what use could the Legislature be? All bills proposed in the Legislature carry a "fiscal note" which indicates the costs which will result or the appropriations which will be required if the bill is passed into

law. The language of this Court would seem to indicate that the Legislature would henceforth be required to obtain the approval of the Board before any such bill could be passed, since the bill would constitute a proposed budgetary expenditure. Plaintiffs cannot believe that this Court intended, by this decision, to engraft such an extension of the power on the Board of Examiners to the exclusion of the Legislative purpose. Certainly in view of the minimal debate engendered by Article VII, Section 13, at the Constitutional Convention, no such radical concept was indicated by the founding fathers.

CONCLUSION

If the Court is indicating in its present decision that the founding fathers intended that the Board of Examiners was to control all of the operations of this State to the exclusion of the Legislative Branch, then there can be no question but that plaintiffs were properly excluded from payment for their out-of-state travel and that the Legislature must henceforth submit all proposed Legislative enactments to which would result in the expenditures of monies to the Board of Examiners for their prior approval before enacting such legislation into law. If, on the other hand, the Board of Examiners does not have the constitutional power of prior approval of proposed expenditures before claims for payment are submitted, then there is no basis upon which the reimbursement of plaintiffs' travel expenses were withheld. Plaintiffs' respectfully submit that the power of the Board of Examiners to prior approval of proposed expenditures must be deemed to exist only as granted by the Legislature itself and not as granted by the Constitution. It is


for this reason that plaintiffs seek clarification of the pronouncements rendered by this Court and urge reconsideration of the Court's decision.

Respectfully submitted,

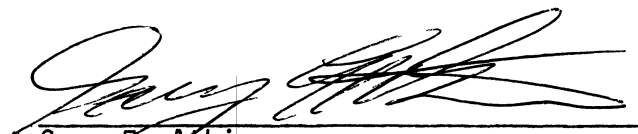
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C E R T I F I C A T E

Delivered a copy of the foregoing Plaintiffs' Petition for
hearing and Brief in Support Thereof to Vernon B. Romney, Attorney
General for the state of Utah and Paul M. Tinker, Assistant Attorney General,
Attorneys for Defendants, Room 236 State Capitol, Salt Lake City, Utah, this
4th day of November, 1976.



Gary E. Atkin

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